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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 10,064

TRAFFIC TELEPHONE WORKERS' FEDERATION OF NEW JERSEY, AN UNINCORPORATED ASSOCIATION, MARY HANSCOM, VIRGINIA WIGGLESWORTH AND ELIZABETH RYAN, INDIVIDUALLY,

Plaintiffs,

vs.

ALFRED DRISCOLL, GOVERNOR OF THE STATE OF NEW JERSEY, WALTER D. VAN RIPER, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, AND HARRY C. HARPER, COMMISSIONER OF LABOR OF THE STATE OF NEW JERSEY,

Defendants

Before the Hon. John Biggs, Jr., Circuit Judge and Guy L. Fake and Thomas F. Meaney, District Judges

STATEMENT AS TO JURISDICTION

Plaintiffs hereby present this Statement of the basis of the jurisdiction of the United States Supreme Court to review, on a *direct appeal,* the order of the specially convened three-judge District Court entered on October 2nd, 1947 in the above entitled cause.

The order appealed from was entered under the stay provisions of Section 266 of the Judicial Code, as amended (28 U. S. C. A. Sect. 380), and stayed proceedings instituted by plaintiffs before the District Court to enjoin the enforcement of Sections 3 to 9, inclusive of Chapter 47 of the Public Laws (1947) of the State of New Jersey, as amended by Chapter 75 P. L. 1947.

In support of such appellate jurisdiction of the Supreme Court, plaintiffs respectfully show that:

I. Statutes Sustaining Jurisdiction

The statutory provisions sustaining such jurisdiction are Sections 266 and 238 of the Judicial Code, as amended (Title 28, Sections 380 and 345 of the United States Code), and particularly the following provisions thereof:

> "• • • *An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interluctory injunction in such case.*" (Sect. 266 of the Judicial Code, as amended; 28 U. S. C. A. Sect. 380). (Italics supplied.)
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> • • • • • • •
>
> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise: • • • (3) *Section 380 of this title*" (Section 238 of the Judicial Code, as amended; 28 U. S. C. A. Section 345). (Italics supplied.)

II. State Statute, the Validity of Which Is Involved

The State statutory provisions, the validity whereof is involved and the enforcement of which was sought to be enjoined, are Sections 3 to 9, inclusive, of Chapter 47, P. L. 1947 of the State of New Jersey, as amended by Chapter

75, P. L. 1947, popularly referred to as the "Utility Anti-Strike Statute."[1] These statutory provisions are set forth in full in Appendix "A", which is attached hereto.

Generally, they outlaw the participation in, authorization, or aiding of, strikes, work stoppages or concerted refusals to work against public utilities after their seizure by the Governor of the State; provide for compulsory arbitration of labor disputes involving public utilities after such seizure; and provide for large and cumulative civil and criminal penalties against public utilities, unions, and their members, for violations of the statute, including refusals to abide by an arbitration award.

Section 3 of the Statute, as amended, provides that, after the Governor has taken or shall take possession of any public utility and during the continuance of such possession:

> "• • • it shall be unlawful for any person employed at such plant or facility to participate in or aid in any strike, concerted work stoppage or concerted refusal to work for the State as a means of enforcing demands of employees against the State or for any other purpose contrary to the provisions of this Act."

Sections 4, 5, 6, and 7, as amended, provide for the compulsory arbitration of the dispute between the employees and the public utility while the utility is in the possession of the Governor.

Section 7 provides that the findings, decision and order of the Arbitration Board, unless modified or reversed on appeal, shall be *"conclusive and binding upon all of the parties to the dispute and such order • • • shall be complied with by the parties in accordance with the terms thereof."* Although this section provides for an appeal to the State Supreme Court from the compulsory arbitration

[1] The official edition of Public Laws 1947, of the State of New Jersey, is not yet available; no citation to the volume and page wherein the statute may be found is, therefore, possible.

award, it limits the judicial review of the award by providing that:

> "In any such appeal the findings of the Board of Arbitration upon the facts, if supported by *any* evidence, shall be *conclusive.*" (Italics supplied.)

It also prohibits a stay of the award pending appeal, unless the appellate court shall so direct.

Section 8, as amended, provides:

> "Any lockout, authorized or engaged in, by any public utility in violation of any provision of this act, or any failure or refusal by a public utility to abide by the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, *or any strike or concerted work stoppage, authorized or engaged in, or continued to be engaged in by any labor union or representative of any craft, class or group of employees of a public utility, or any concerted action on the part of a substantial number of the members of any labor union resulting in an interruption of the operation of any public utility, in violation of any provision of this act or in connection with any refusal to abide by the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, shall subject* such public utility and any officer or agent thereof participating or aiding therein or *such labor union or representative of any craft, class or group of employees of a public utility to a penalty in the sum of ten thousand dollars ($10,000.00) per day for each day during the period of such lockout, strike or concerted work stoppage,* such penalty to be recovered in the name of the State in an action at law in any court of competent jurisdiction. (Italics supplied.)

Section 9, as amended, provides:

> *"Any officer or agent of any public utility or labor union, or any person performing the duties of such officer or agent, who shall willfully violate, or aid and*

abet the violation of any of the provisions of this act, or attempt to do so, shall, for each such offense, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five dollars ($25.00) nor more than two hundred fifty ($250.00) dollars. Each day's continuance of the violation shall constitute a separate offense." (Italics supplied.)

III. The Date of the Order Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The order of the three-judge District Court sought to be reviewed was entered on October 2, 1947. That order constitutes the opinion of the said Court filed July 3, 1947, its Findings of Fact and Conclusions of Law.

The petition for appeal is herewith presented and filed on October 24, 1947.

IV. Nature of the Case and Rulings of the District Court

The case, made by the plaintiffs' complaint and the affidavits annexed thereto, and by the testimony given at the hearing, is substantially undisputed and is as follows:

Events Leading Up to This Action

Plaintiff union is, and for many years has been, the recognized collective bargaining agent for 12,000 women telephone operators who are employed by the New Jersey Bell Telephone Company, and are engaged in *interstate commerce* while so employed. The individual plaintiffs are officers and members of the Union.

For a long time prior to March 31, 1947 (the expiration date of its last collective bargaining contract with the Company), representatives of the Union and of the Company had engaged in extensive negotiations for a new labor contract. Such negotiations having proved fruitless, the mem-

bers of the Union voted to strike over the disputed issues after fully complying with all applicable laws; and on April 7, 1947, the entire membership of the union commenced a peaceful strike against the Company and began peaceful picketing of the Company's offices in the State of New Jersey. The strike and picketing were then perfectly lawful under the then existing laws of New Jersey.[2]

On the afternoon of the same day, the Governor of New Jersey, purporting to act under Section 13 of P. L. 1946, Chap. 38 of the Laws of that State (R. S. 34: 13B-13),[3] by executive order directed the Commissioner of Labor of New Jersey to seize and take possession of the plants and facilities of the telephone company.

On the night of April 8, 1947, after the lawful strike had been made effective, the legislature of the State of New Jersey, without any public hearing or substantial debate, enacted a bill which became the statute now under attack. This bill was introduced about two hours before its passage,

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[2] The New Jersey Anti-Injunction Act (R.S. 2:29-77.1 et seq.) and the New Jersey decisions all recognized the right of workers to strike, to picket and to engage in other peaceful strike activities. *Isolantite, Inc.* v. *United Electric Workers*, 132 N. J. Eq. 613; *Kingston Traprock* v. *International etc. Local*, 129 N. J. Eq. 570; *Heine's Inc.* v. *Truck Drivers Union*, 129 N J. Eq. 308; *Feller* v. *Local, No. 144*, 129 N. J. Eq. 421; *E. L. Kerns Co.* v. *Landgraft*, 128 N. J. Eq. 441.

[3] Section 13 provides:—

"Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this act and as a result thereof the *effective operation of a public utility be threatened or interrupted*, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout *which in the opinion of the Governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the* event that neither side has given notice to the other of an intention to seek a change in working conditions and there occurs a lockout, strike or work stoppage which, in the opinion of the Governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to

and had been drafted by the counsel to the Governor, *who was at the same time a Director of the Telephone Company.* Almost immediately, the Governor let it be known that if the strike were *promptly discontinued* he would not sign the bill. The union, having been advised that the statute was unconstitutional, refused to end the strike. Thereupon on April 9, 1947 at 5 p. m. the Governor signed the bill.

Immediately after approving that statute, the Governor publicly stated that the continuation of the strike and picketing by the Union and its members was unlawful, and instructed all law enforcement agencies throughout the State to break up all picket lines, no matter how peacefully conducted, and to arrest all alleged violators of the statute. Similar statements were issued by the defendant Attorney General. These threats were broadcast over the radio and in the press.

The Governor and the Attorney General lost no time in enforcing the statute. On April 11, 1947, the individual plaintiffs were arrested and taken into custody by the Sheriff of Essex County on a complaint preferred by a Supervisor in the State Department of Labor on the ground that they had participated and aided the strike in violation of the challenged statute. They were fingerprinted, photo-

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take immediate possession of the plant, equipment, or facility *for the use and operation by the State of New Jersey in the public interest.* Such power and authority may be exercised by the Governor through such department or agency of the government as he may designate and many be exercised after his investigation and *proclamation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike,* a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of *such authority is necessary to insure the operation of such public utility, provided* that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute." (Italics Supplied)

graphed, and numbered like common criminals, and were released from custody only upon the security of bail bonds in the amount of $500 each, conditioned upon their appearance before the Grand Jury of the County of Essex. The penalty then prescribed by Section 9 of P. L. 1947, Chapter 47 (before its amendment) was a fine of not less than $250 or more than $500, or imprisonment not exceeding 30 days, or both,[4] each day's continuance of the strike being a separate offense.

On the same day, the defendant Attorney General instituted an action against plaintiff union to recover a $10,000 penalty under Section 8 of the statute based on the continuance of the strike on April 10th in violation of the statute.

The statute constitutes a pervasive threat to the very existence of plaintiff union, and was obviously intended to break plaintiff union and to break plaintiffs' strike.

As a result of the arrest of the union's leaders, and the penalty suit, and the other acts and threats of the defendants and the police, acting under defendants' direction, many members of the plaintiff union resigned, others were frightened into stopping their peaceful picketing, and still others were intimidated into returning to work against their will. The continued enforcement of the statute threatened to impair or break the strike and to decimate the membership of the plaintiff union, with a resulting loss in dues, collective bargaining strength, and security of the union and its members. Plaintiffs and the members of the union were also threatened with a multiplicity of civil and criminal suits which, if successful, would result in exorbitant and cumulative penalties which they could not afford to pay.

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[4] After the entry of the temporary restraining order by the District Court the legislature mollified the penalties to those mentioned on page 5 hereof.

Filing of this Action

Faced with this grave threat of irreparable injury, and being advised that the challenged statute deprived them of civil, personal and property rights guaranteed by the Constitution and Laws of the United States, plaintiffs, on April 14, 1947, filed this action in the District Court, and applied for an interlocutory and final injunction under section 266 of the Judicial Code, as amended (28 U. S. C. A. 380), to restrain the defendants herein, their agents, servants and employees and all law enforcement officers of the State (a) from enforcing or attempting to enforce the challenged statutory provisions against plaintiffs or others acting in concert with them; (b) from continuing to prosecute the criminal actions against the individual plaintiffs and the penalty action against plaintiff union, and from instituting other criminal or penalty proceedings under the statute against plaintiffs or others acting in concert with them; and (c) from making or issuing any public statements, proclamations or orders to the public or to the law enforcement officers or agents of the State, announcing or directing that the plaintiffs or any one acting in concert with them would be prosecuted civilly or criminally under the statute by reason of their work stoppage or refusal to return to work or otherwise. The complaint also prayed for a temporary restraining order, and requested that a three-judge court be convened in accordance with section 266 of the Judicial Code, to grant the interlocutory relief prayed for.

Jurisdiction of the District Court to entertain the cause was based not only on section 266 of the Judicial Code, but also on the provisions of section 24, par. 14 of the Act of March 3, 1911 (c. 231, 36 Stat. 1092, 28 U. S. C. A. Section 41(14)), which confers jurisdiction over suits brought under the Civil Rights Act (sec. 1, Act of April 20, 1871, c. 22,

17 Stat. 13, 8 U. S. C. A., sec. 43), and sec. 24, par. 8 of the Act of March 3, 1911 (c. 231, 36 Stat. 1092), as amended (28 U. S. C. A. sec. 41(8)), which grants jurisdiction of suits and proceedings arising under any law regulating commerce.

Plaintiffs claimed that the provisions of the State statute under attack[5] violated the Constitution and Laws of the United States by denying them and the members of the union the right of free speech, petition and assembly, and the right peacefully to picket, strike and to bargain collectively;[6] by imposing involuntary servitude upon them

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[5] The complaint originally challenged only sections 3 to 9 of chapter 47, P.L. 1947. Eight days after this suit was filed these sections were amended by Chapter 75, P.L. 1947. The court treated the complaint as amended so as to challenge the constitutionality, of sections 3 to 9, as so amended.

[6] Plaintiffs contended that : (1) These rights are protected by the First and Fourteenth Amendments to the Federal Constitution from abridgement by the State, relying upon the following authorities, among others:

Picketing: Senn v. *Tile Layers Protective Union*, 301 U. S. 468; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Milkwagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 293; *American Federation of Labor* v. *Swing*, 312 U. S. 321.

The Right to Strike and Collective Bargaining: Hitchman Coal & Coke Co. v. *Mitchell*, 245 U. S. 229, 251; *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 196; *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 61, (D. C. Kans.); *Carpenters' Union* v. *Citizens' Committee*, 333 Ill. 225; *Alabama State Federation of Labor* v. *McAdory*, 246 Ala. 1; *Lindsay* v. *Montana Federation of Labor*, 37 Mont. 264.

(2) The statutory prohibitions against the exercise of these rights cannot be sustained on the theory that there can be no strike against the State or that this was a strike against the State, relying upon the following authorities, among others:—*Ziskind, 1000 Strikes of Government Employees*, pp. 233, 234, 251 (*Columbia University Press 1940*); *Agger, The Government and its Employees*, 47 Yale Law Journal 1109; *Arthur V. Oakes*, 63 Fed. 310; *United States* v. *Kane*, 23 Fed. 748; *Board of Trustees of Public Affairs of Village of Selina, Ohio* v. *Now*, 9 L. R. R. Man. 789.

(3) The statutory prohibitions against the exercise of these rights cannot be justified on the theory of grave and immediate danger to the public, relying upon the following authorities, among others:—*Mugler* v. *State of Kansas*, 123 U. S. 623; *Schneider* v. *Irvington*, 308 U. S. 147; *Duncan* v. *Kahanamuku*, 327 U. S. 304 (concurring opinions of Chief Justice Stone and Mr. Justice Murphy); *West Virginia* v. *Barnette*, 319 U. S. 624; *Bridges v. California*, 314 U. S. 252, 261-263.

and the members of the Union;[7] and by denying them due process of law, the equal protection of the laws and the privileges and immunities guaranteed them by the Constitution.[8] The statute was also challenged on the ground that it denied plaintiffs and the members of the union of the equal protection of the laws, by depriving them of the freedom to have access to the courts to redress wrongs under unconstitutional statutes without being fettered with severe, exorbitant and cumulative fines and penalties;[9] that its compulsory arbitration provisions deprived plaintiffs and members of the union of their liberty to contract, and of their property, without due process of law;[10] that is was an

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[7] Plaintiffs relied on the Thirteenth Amendment to the Constitution and the following authorities, among others: *Bailey* v. *Alabama*, 219 U. S. 219; *Taylor* v. *Georgia*, 315 U. S. 25; *Pollock* v. *Williams*, 322 U. S. 4; *The Peonage cases*, 123 Fed. 675; *Lindsay* v. *Montana, Federation of Labor*, 37 Mont. 264; *New Jersey Painting Co.* v. *Local No. 26*, 96 N. J. Eq. 632; *United States* v. *Petrillo*, 68 Fed. Supp. 845, 849, reversed on other grounds, 91 L. Ed. (Adv.) 1403; *Henderson* v. *Coleman*, (not officially reported) 7 So. (2d) 117 (Fla.); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association of North America*, 274 U. S. 37 (dissenting opinion by Justices Brandeis and Holmes).

[8] Plaintiffs relied upon Section 2 of Article 4 and Section 1 of the 14th Amendment of the Constitution, and the following authorities:

Yick Wo v. *Hopkins*, 118 U. S. 356; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445

[9] Plaintiffs relied upon Section 1 of the 14th Amendment of the Constitution and the following authorities, among others:—

Ex parte Young, 209 U. S. 123; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 54; *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U. S. 340, 348; *Harrison* v. *St. Louis E. F. R. Co.*, 232 U. S. 318, 328; Footnote 46 *L. R. A.* (N. S.) 1039.

[10] Plaintiffs relied upon Section 1 of the 14th Amendment to the Constitution and the following authorities, among others:

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522, 534, 267 U. S. 552, 559; *Coppage* v. *Kansas*, 236 U. S. 1; *Dorchy* v. *Kansas*, 264 U. S. 286; *St. Louis I. M. & S. R. Co.*, v. *Williams*, 49 Ark. 492; *Re Compulsory Arbitration*, 9 Colo. 629; *Re People ex rel. Baldwin* v. *Haws*, 37 Barb. (N. Y.) 440; *Cutler & Hinds* v. *Richley*, 151 Pa. St. 195.

ex post facto law, and a bill of attainder;[11] and that it violated the Supremacy and Commerce clauses of the Constitution and impinged upon a field preempted by the following Federal statutes: The National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 440, 29 U. S. C. A. secs. 151, 157, 163), the Norris LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U. S. C. A. sec. 102), and the Federal Communications Act of 1934 (Act of June 19, 1934, c. 652, 48 Stat. 1064, 47 U. S. C. A. sec. 151).[12]

Plaintiffs also charged that the challenged statute, on its face and as applied to them, and the threats and acts of the defendants and their agents, threatened to cause plaintiffs imminent and irreparable injury calling for immediate equitable injunctive relief.

The Temporary Restraining Order

On April 15, 1947, after notice to defendants and after extensive argument of counsel for plaintiffs and the Attorney General, lasting almost ten hours, District Court Judge Fake filed an opinion (reported in 71 Fed. Supp. 681) sustaining plaintiffs' motion for a temporary restraint in which he found that:[13]

"• • • if the statute complained of is eventually found to be invalid the unions and the strikers here

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[11] Plaintiffs relied upon Section 10 of Article 1 of the Constitution and the following authorities, among others:

Calder v. *Bull*, 3 Dall. (U. S.) 386; *Re Garland*, 4 Wall (U. S.) 333; *Malloy* v. *South Carolina*, 237 U. S. 180; *Duncan* v. *Missouri*, 152 U. S. 377; *Cummings* v. *Missouri*, 71 U. S. 277; *Fletcher* v. *Peck*, 6 Cranch (U. S.) 87; *Hawker* v. *State of New York*, 170 U. S. 189.

[12] Plaintiffs relied upon section 8 of Article 1 and Article 6 of the Constitution and the following authorities among others:

Bethlehem Steel Company v. *New York State Labor Relations Board*, 91 L. Ed. (Adv.) 887; *Hill* v. *Florida*, 325 U. S. 538; *Hamilton* v. *National Labor Relations Board*, 160 F. (2d) 465 (CCA 6).

[13] The Court relied on and cited *A. F. of L.* v. *Watson*, 327 U. S. 582; *Stapleton* v. *Mitchell*, 60 F. Supp. 51. See also *Modern Woodmen of America* v. *Casados*, 15 F. Supp. 483 (Dist. Ct. N. Mexico).

will suffer an *irreparable injury* by the continued enforcement of the State statute. At this moment they are confronted not only with the hazards of arrest but with a multiplicity of suits tending to destroy the union. In weighing the equities and inconveniences involved, I take notice of the fact that the pending strike has not impeded official calls, or private emergency calls, so the problem narrows down to a consideration of private and individual inconveniences on the one side and the heretofore recognized right of the strikers on the other * * *." (Italics supplied.)

The temporary restraining order, which was issued on April 15, 1947, as amended on April 18, 1947, required all of the defendants herein to hold in *status quo* the criminal and civil proceedings against plaintiffs and enjoined them from instituting further civil or criminal actions under the statute until the further order of the court. The order, however, permitted arbitration under the statute, without prejudice to plaintiffs' rights asserted in these proceedings.[14]

By the order of April 15, 1947, Judge Fake called to his assistance, to hear and determine plaintiffs' application for an interlocutory injunction, the Honorable John Biggs, Jr., Senior Judge of the United States Circuit Court of Appeals for the Third Circuit, and the Honorable Thomas F. Meaney, Judge of the District Court.

The Action in the Court of Chancery

On April 18, 1947, five days prior to the hearing on the interlocutory injunction, the Attorney General, assuming to act for the State, filed a bill of complaint in the Court of Chancery of New Jersey against the plaintiffs in this cause and the New Jersey Bell Telephone Company, as defendants, in which he prayed, among other things, for declara-

[14] This was provided for in the amending order of April 18, 1947.

tory relief as to the validity of the Governor's seizure and the constitutionality of the challenged statute and proceedings taken thereunder, and for an injunction restraining plaintiffs from interfering with the operation of the utility. In his bill, he prayed for a preliminary injunction *against himself, the Commissioner of Labor*, and all law enforcement officers of the State which would enjoin them from continuing or instituting enforcement proceedings under the statute pending the determination by the Court of Chancery of its constitutionality.[15]

The following day, without notice to plaintiffs herein, and without affording them an opportunity to be heard, the New Jersey Chancellor, at Trenton, granted the Attorney General's *ex parte* application and issued the preliminary injunction prayed for, *even though the persons restrained—the Attorney General and the Commissioner of Labor—were not parties to the suit and no final relief of any sort was prayed against them.* The *ex-parte* preliminary injunction was not as broad in scope as the relief prayed for by the plaintiffs herein in their application for an interlocutory injunction in the District Court.

The Stay Order and the Opinion of the District Court

At the hearing on plaintiffs' application for an interlocutory injunction, which was held on April 23, 1947, the Attorney General moved for a stay of further proceedings before the three-judge court, pursuant to Section 266 of

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[15] There is no statute in New Jersey authorizing the Attorney General to bring an action to restrain himself from enforcing the criminal laws of the State. Also, when the Chancery bill of complaint was filed, there was no State Statute authorizing a suit to restrain interference with the Governor's possession of the utility. Four days after the suit was filed the Legislature enacted Chap. 75 P. L. 1947, sect. 11 of which purported to authorize such proceedings. But, as hereinafter shown, under the New Jersey Constitution, the Legislature could not confer such authority on the Court of Chancery. See N. 18, infra.

the Judicial Code, as amended by the Act of March 4, 1913 (c. 160, 37 Stat. 1913, 28 U. S. C. A. Sec. 380), on the basis of the Chancery action and the *ex-parte* preliminary injunction therein.

Section 266, after providing for a hearing by a three-judge court on an application for an interlocutory injunction to enjoin the enforcement of an unconstitutional State statute, provides:

> "• • • if before the final hearing of such application a suit shall have been brought in a court of the State *having jurisdiction thereof under the laws of such State, to enforce such statute* or order *accompanied by a stay in such State Court of proceedings under such statute* or order pending the determination of such suit by such State Court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the Attorney General of the State, that the suit in the State Courts is not being prosecuted with diligence and good faith." (Italics supplied.)

Plaintiffs continued to press their motion for an interlocutory injunction. At the hearing, they introduced witnesses who were examined and cross-examined. Extensive arguments were had and briefs were filed on the merits of the plaintiffs' case as well as on the defendants' motion for a stay. With the consent of the parties, the Court ruled that, if the stay moved for by the Attorney General were denied, the case would be disposed of as if on final hearing, and a final decree would be entered. Judge Fake's temporary restraining order was continued until the further order of the Court.

On July 3, 1947, the three-judge Court filed its opinion granting the defendants' motion for a stay of proceedings

pending the determination of the suit in the State Court of Chancery.

In its opinion (72 Fed. Supp. 499), the Court recognized that "the reach of the New Jersey Act is indeed broad" and that the Chancery action and P. L. 1947, Chapter 75, were "anomalous" in many respects, but it nevertheless held that it was required to stay further proceedings in the District Court under Section 266 of the Judicial Code. *In so holding, the Court refused to follow a decision of the highest court of the State of New Jersey and three decisions of three-judge District Courts of coordinate jurisdiction and equal dignity, sustaining the plaintiffs' objections to the stay, thus creating at least four conflicts of law.*

The District Court overruled plaintiffs' contention that the Chancery suit and preliminary injunction satisfied none of the statutory prerequisites for such a stay. Plaintiffs had contended that the stay should not issue because:

(1) The Court of Chancery was without jurisdiction to enjoin criminal prosecutions and actions for the collection of statutory penalties.

(2) The bringing of the Chancery action and the Chancery preliminary injunction were not authorized by the laws of the State of New Jersey.

(3) The Chancery action was not one "to enforce the statute" under challenge, within the meaning of section 266 of the Judicial Code.

(4) The Chancery action was not accompanied by a stay of all proceedings under the challenged statute, and the Chancery injunction was not as broad in scope as the interlocutory relief which was prayed for in the District Court.

(5) The action in the State Court was *not* a *bona fide* suit involving a genuine controversy so far as it related to the injunction sought and granted therein.

(6) The Chancery action was filed and the accompanying injunction obtained *after* the entry of the temporary restraining order in the District Court.

On October 2, 1947, the Court entered an order granting a stay in accordance with its opinion and made its opinion its Findings of Fact and Conclusions of Law.

V. Substantial Questions Involved

It is believed that the instant case is the first reported case in which a Federal three-judge Court has granted such a stay of proceedings, and that the case raises, for the first time, the question of the conditions precedent which must be satisfied to warrant a stay of proceedings under Section 266. The following substantial questions are involved on this appeal:

1. May a District Court stay proceedings therein to enjoin the enforcement of an allegedly unconstitutional State statute under section 266 of the Judicial Code, without *affirmatively finding* that the action in the State Court and the injunctive order granted therein satisfied all of the statutory prerequisites for a stay under that section?[16]

2. May a District Court abdicate its judicial function and relegate to the State courts the determination of the ques-

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[16] The District Court made no affirmative findings with respect to the following two important prerequisites to the exercise of its jurisdiction: (1) that the Court of Chancery had jurisdiction to entertain the Chancery suit and to issue the preliminary injunction (see N. 19, infra), and (2) that that suit was bona fide and involved a genuine controvery. (See N. 24, infra). It concluded merely that "we cannot hold * * * that the Court of Chancery was without power" and that "we cannot believe that the Court of Chancery issued a frivolous order", and assumed the existence of such jurisdiction and the genuineness of the suit merely from the circumstance that the Chancery injunction issued.

The Court had no jurisdiction to order a stay of proceedings under Section 266 without making such findings. Before a District Court may act, it must affirmatively find that it has jurisdiction to grant the relief sought. See *Phillips* v. *United States*, 312 U. S. 246, 253; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 188-190.

tion whether a prerequisite for a stay under Section 266 has been satisfied, as for example, whether the State Court has jurisdiction over a suit before it and to issue an injunction such as Chancery issued in this case; may it do so in the face of governing decisions on the question by the highest court of the State; and is the District Court required to follow and apply such decisions?[17]

The decision of the District Court creates a conflict with that of the New Jersey Court of Errors and Appeals in *Moresh* v. *O'Regan*, 122 N. J. Eq. 388.[18]

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[17] The District Court left to the State courts the determination of the questions of the jurisdiction of the Court of Chancery and the genuineness of the Chancery controversy in the face of governing State court decisions on these questions. (See notes 18 and 24, infra.) That it could not do. For a District Court itself must decide questions, such as these, which are involved in determining the applicability of a Federal statute, *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 279; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561-562; *American Surety Co.* v. *Bethlehem National Bank*, 314 U. S. 314, 316. This is so even with respect to matters of State law, including the question of the jurisdiction of a State court. (See *Phillips* v. *United States*, 312 U. S. 246, 253), which the District Court must decide on the basis of State precedents, if there are any. It may not relgate such questions to the State courts for determination. See *Hillsborough Township* v. *Cromwell*, 326 U. S. 620; *Corporation Commission of Oklahoma* v. *Cary*, 296 U. S. 452; *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 110. See also *Commonwealth Trust Co.* v. *Bradford*, 297 U. S. 613, 618; *Meredith* v. *Winter Haven*, 320 U. S. 228. Nor in deciding questions of State law, may the District Court, as in the instant case, ignore settled law established by the highest court of the State (*Hillsborough Township* v. *Cromwell, supra; Dohany* v. *Rogers*, 281 U. S. 362), merely because an inferior State tribunal—here the Court of Chancery—has done so in issuing the preliminary injunction. See *Moores* v. *Citizens Nat. Bank*, 104 U. S. 625; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538, 543.

[18] In *Moresh v. O'Regan, supra*, the Court of Errors and Appeals held that the Court of Chancery has no jurisdiction to enjoin criminal prosecutions or actions for the collection of statutory penalties, that it has no jurisdiction in such a proceeding to render a declaratory judgment, and that, under the New Jersey Constitution, the Legislature could not confer such jurisdiction on that court. In so holding, the court merely followed fundamental doctrine in the State of New Jersey, which protects the historical separation of jurisdiction between law and equity from encroachment by the courts or the Legislature, and prohibits either the courts or

3. May a District Court stay proceedings pending therein under section 266 merely because a State court has issued an injunction restraining enforcement of a State statute where the State court has no fundamental jurisdiction to issue such injunction? [19]

4. Is the requirement of section 266 that the State court have jurisdiction, satisfied by the tenuous jurisdiction (which the District Court assumed that Chancery possessed) to grant an injunction to maintain the status quo of an action before it, even though it lacks fundamental jurisdiction to grant such an injunction on final hearing? [20]

5. Under section 266, may the Attorney General of New Jersey file, and may the State Court of Chancery enter-

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the Legislature from stripping any of the constitutional courts—in the *Moresh* case, and in the instant case the law courts—of jurisdiction conferred upon them by the State Constitution. *Weiss* v. *Levine*, 133 N. J. Eq. 441 (Chancery); *Flanigan* v. *Guggenheim*, 63 N. J. L. 647, (E&A); *Hedden v. Hand*, 90 N. J. Eq. 583 (E&A).

[19] The District Court held that the stay could issue even if the Court of Chancery had no jurisdiction to grant the preliminary injunction. Unless the State court has such jurisdiction, "this is not a case for which the procedural structure" of the stay provisions of section 266 was devised. *Phillips* v. *United States*, 312 U. S. 246, 253. See also *Frieberg Co.* v. *Dawson*, 274 Fed. 420 (D. C. Ky.), affirmed sub nom. *Dawson* v. *Frieberg Co.*, 255 U. S. 288.

[20] The District Court recognized that, under *Moresh* v. *O'Regan*, 122 N. J. Eq. 388, the Court of Chancery had no jurisdiction to enjoin criminal prosecutions or to grant declaratory relief with respect to the challenged criminal statute, either under its inherent authority or under the New Jersey Declaratory Judgment Act. The Court was of the view however, that even though such fundamental jurisdiction were lacking, Chancery had the power to issue the preliminary injunction to maintain the status quo of the action before it, by analogy to the doctrine established by *United States* v. *United Mine Workers of America*, 330 U. S. 258, and that such jurisdiction satisfied section 266. The law of New Jersey is in conflict with that laid down in the *Mine Workers* case, *Dodd* v. *Una*, 40 N. J. E. 672; *In Re Roberts*, 133 N. J. E. 122, and that case is not at all analagous to the case at bar. But even assuming that the doctrine of the *Mine Workers* decision is applicable, is the kind of jurisdiction there involved the sort of jurisdiction which is contemplated by the stay provisions of section 266 of the Judicial Code?

tain a suit for an injunction restraining the enforcement of a State criminal statute, alleged to be unconstitutional, in the absence of a State statute conferring such power upon the Attorney General and jurisdiction upon the State Court?[21]

6. Was the Chancery action one "to enforce" the challenged statute within the meaning of section 266 of the Judicial Code?[22]

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[21] There is no such enabling statute in New Jersey. An eminent authority on the subject has stated that such a State statute is necessary in order for the State court suit and injunction to satisfy the requirements for a stay under section 266. Welsh Pogue, *State Determination of State Law*, 41 Harvard L. Rev. 623, 635. The Supreme Court of the United States has cited this article with approval. *Phillips* v. *United States*, 312 U. S. 246, 250. Moreover, the Supreme Court has stated that proceedings may be stayed under section 266 *"if appropriate provision is made for testing"* the validity of the challenged State statute. *Phillips* v. *United States, supra*, at 253. It is significant that at least four States, (Arizona, Nebraska, New York and Wisconsin) have adopted the necessary enabling statutes. Legis. (1937), 50 Har. L. Rev. 813, 819, N. 27; 78 Cong. Rec. 2016 (1934); Note (1941), 54 Har. L. Rev.. 1379, 1382. The District Court held that such statutory authority was not required, relying on cases which are not apposite and expressly refusing to follow *Pogue, supra*.

[22] The District Court held that the Chancery suit could be regarded as one "to enforce the statute," even though it conceded that it was anomalous for Chancery to aid the Attorney General and the law enforcement officers of the State by the injunctive process, in their duty to enforce a criminal law. In so holding, the court manifestly erred.

The Chancery action has two aspects: (1) It is a suit to have the challenged statute declared constitutional and to enjoin the Attorney General and the Commissioner of Labor from enforcing the statute pending the determination of its constitutionality so that the Federal Court would be ousted of jurisdiction. Obviously such a suit is not one to enforce the challenged statute. Rather, it is one to *restrain its enforcement*. (2) The suit also sought to enjoin allegedly tortious conduct—plaintiffs' alleged interference with the operation of the utility seized by the Governor. The bill of complaint (par. 27) states that the State is invoking "the general equity powers of the Court because of the wrong being suffered by the State." When equity restrains such conduct, even though criminal, it does so not because it is criminal, but because it is tortious, and because other requisites of equity jurisdiction are present,—e. g., irreparable injury. It does not punish the defendant for the commission of the crime; that is left to the criminal courts. In fact, the Court of Chancery has no

7. May section 266 be invoked where, as here, the State Court injunction does not stay all proceedings under the challenged statute and is not as broad in scope as the interlocutory relief for which the plaintiffs prayed in their complaint in the District Court? The decision of the District Court creates a conflict with *Northwestern Bell Telephone Co.* v. *Hilton*, 274 Fed. 384.[23]

8. Is the Chancery action a bona fide suit involving a genuine controversy insofar as it relates to the injunction granted therein? The decision of the District Court creates a conflict with that of *Peltason, Tenenbaum & Harris, Inc.* v. *Refunding Board of Arkansas*, 16 F. Supp. 179.[24]

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jurisdiction under the State Constitution to "enforce" a criminal or penal statute. That is the function of the law courts. *McMillan* v. *Keuhnle*, 78 N. J. Eq. 251; *Green* v. *Piper*, 80 N. J. Eq. 288; *Ocean City Assn.* v. *Schurch*, 57 N. J. Eq. 268.

[23] The District Court held that the Chancery injunction satisfied the requirements of section 266 in this respect. But one of the proceedings under the State statute which plaintiffs challenge as unconstitutional, is that requiring compulsory arbitration. The complaint in the Federal suit prays for an injunction against the enforcement of those provisions. It is to be noted, however, that the Chancery injunction does not stay proceedings under the arbitration sections. On the contrary, it deliberately excepts them from the restraint.

In addition, the Chancery injunction does not enjoin the Governor of the State, whereas plaintiffs sought injunctive relief against him in this cause.

"Congress could not have intended to oust the jurisdiction of the Federal courts, excepting where the State courts were providing an adequate substitute." *Frieberg Co.* v. *Dawson*, 274 Fed. 420, 427, affirmed sub nom *Dawson* v. *Frieberg Co.*, 255 U. S. 288.

[24] The Chancery bill does not allege any cause of action against the Attorney General or the Commissioner of Labor, the persons enjoined therein, does not make them parties to the suit, and does not pray for final relief against them. The injunction is, therefore, a nullity and may be so treated in these proceedings. *Munday* v. *Vail*, 34 N. J. L. 418; *Reynolds* v. *Stockton*, 140 U. S. 254; *Hubbard* v. *Montrose Metal Shingle Co.*, 79 N. J. L. 209; *Weiss* v. *Levine*, 133 N. J. Eq. 441. Moreover, paragraph 20 of the Chancery bill shows that the Attorney General voluntarily applied for and submitted to the Chancery injunction; that the application was not an adversary one; and that there was no genuine controversy justifying the injunction. In short, it is obvious that the suit is a sham

9. May the stay provisions of section 266 of the Judicial Code, as amended, be invoked where the State court suit is filed and the accompanying State court injunction is obtained *after* the entry of a temporary restraining order in the Federal Court? The decision of the District Court creates a conflict with that of the District Court for the Eastern District of Kentucky in *Union Light, Heat & Power Co.* v. *Railroad Commission*, 17 F. (2d) 143.

10. Under the circumstances of this case, should not the District Court have proceeded to determine the case on the merits?[23]

The proper determination of the foregoing questions is a matter of grave public importance. It not only substantially affects plaintiffs' rights but also goes to the very

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and fictitious action, a mere stratagem brought for the purpose of obtaining the injunction so that the Federal Court would be ousted of jurisdiction. Such a suit is not entitled to recognition by the Courts (*Lord* v. *Veazie*, 8 How. (U. S.) 251; *Chamberlain* v. *Cleveland*, 1 Black. (U. S.) 419), nor can it be used as the basis for a stay under section 266, *Peltason, Tenenbaum & Harris, Inc.* v. *Refunding Board of Arkansas*, 16 F. Supp. 179 (D. C. Ark.).

[23] The District Court relied, in part, on *A. F. of L.* v. *Watson*, 327 U. S. 582, in granting the stay. But that case is not in point. Section 266 gives no discretion to the District Court. If the statutory prerequisites for a stay are satisfied, the Court must issue the stay; if one or more of such prerequisites are lacking, the stay may not issue. The District Court did not assume to exercise any discretion, but made the order because it was compelled to do so by section 266. The *Watson* case merely held that a Federal Court in the exercise of its discretion may withhold a decision on the *merits* involving State statutes alleged to be unconstitutional where the meaning and application of such statute is ambiguous and doubtful. In such circumstances, the District Court may hold the bill pending a resolution of the ambiguities by the State courts. The *Watson* case did not involve a motion for a stay under section 266. The doctrine of the *Watson* case is inapplicable to the instant case even if that question were involved in the present appeal. Here the State statute under challenge is plain and unambiguous on its face, is clearly applicable, and has been applied to plaintiffs, and does not require any construction or interpretation by the State courts before its constitutionality may be determined.

heart of the effective administration of Section 266 of the Judicial Code.

The construction of the stay provisions of section 266 adopted by the District Court in this cause, if allowed to stand, will completely emasculate section 266, as well as other Federal Statutes, including the Civil Rights Act, (8 U. S. C. A. sec. 43) and the Acts conferring jurisdiction on the District Courts over civil rights cases (28 U. S. C. A. sec. 41 (14) and cases arising out of laws regulating commerce (28 U. S. C. A. sec. 41 (8)), insofar as suits to restrain the enforcement of an unconstitutional State statute are concerned. It will have a most profound adverse effect upon civil rights controversies, and will deprive labor and others, whose constitutional rights are invaded, of a Federal judicial forum. For, under the District Court's construction, any suit and restraint in a State court may result in a stay of Federal court proceedings under section 266, no matter how sham, frivolous, collusive, or lacking in merit, such suit may be, and even though the State court has no jurisdiction to entertain the suit or to enter an order restraining the enforcement of the challenged State statute. The District Court's decision, if allowed to stand, will provide an easy road to the abdication by the Federal courts of their judicial functions to the State courts.

Moreover, as already indicated, the decision of the District Court conflicts with the decisions of other three-judge District Courts.

For the foregoing reasons, it is respectfully submitted that such questions are substantial and should now be resolved by the Supreme Court.

VI. Matters in Which the District Court Has Abused Its Discretion in Issuing the Stay Order

Plaintiffs believe that the errors committed by the District Court did not involve the exercise of discretion on its part but were in violation of a plain legal duty. If, nevertheless, it is considered that the element of discretion is involved, the District Court manifestly abused such discretion in committing such errors.

VII. Cases Sustaining the Jurisdiction of the Supreme Court of the United States

Section 266 of the Judicial Code provides that an interlocutory injunction against the enforcement of a State statute "upon the ground of the constitutionality of such statute," must be heard and determined by a three-judge court. The hearing "upon such application" is required to be expedited. An appeal may be taken direct to the Supreme Court "from the order granting or denying, after notice and hearing, an interlocutory injunction *in such case.*" (Emphasis supplied.) It also provides for a similar direct appeal to the Supreme Court from an order granting or denying a permanent injunction.

The Supreme Court has entertained direct appeals from orders of three-judge courts under section 266 granting or denying an interlocutory or final injunction, (*Buck* v. *Gallagher*, 307 U. S. 95; *Gibbs* v. *Buck*, 307 U. S. 66; *A. F. of L.* v. *Watson*, 327 U. S. 582; *Dawson* v. *Kentucky Distilleries and Warehouse Co.*, 255 U. S. 288; *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133. See *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10), even though, as in the case at bar, the order appealed from was not based on constitutional grounds. *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Buck* v. *Gallagher*, *supra*.

So far as plaintiffs have been able to ascertain from the reported cases, the Supreme Court has never decided an appeal from a stay order issued under section 266.

It is respectfully submitted that, for the reasons hereinafter set forth, the stay order appealed from in the instant case is directly appealable to the Supreme Court as an order granting or denying an interlocutory injunction within the meaning of section 266.

1. *The Order Staying Proceedings in This Cause Is an Order Granting an Interlocutory Injunction Against Such Proceedings, and in Effect is a Denial of Injunctive Relief to Plaintiffs.*

The appellate relief afforded by section 266 is not restricted to the terminology used in the order appealed from or in the statute. It looks to the substantial effect of the order. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U. S. 10. Cf. *Ettleson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, 192; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Sims* v. *Greene*, 160 F. (2d) 512 (C. C. A. 3).

The stay order here involved does not merely continue or postpone the trial of the cause before the District Court. In fact, should the State courts hold in favor of Chancery jurisdiction to issue the preliminary injunction, the District Court may never be called upon to determine the issues in this cause. The Chancery proceeding thus "may in practical effect, terminate" the case before the District Court and plaintiffs are "in no different position than if a State equity court had restrained them from proceeding" in the District Court case. *Ettleson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188, 192.

Such an order is an order granting an injunction against the proceedings in the District Court and accordingly is directly appealable to the Supreme Court under section 266.

Cf. *Ettleson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188; *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.*, 293 U. S. 449; *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379. See also *United States* v. *Baker-Lockwood Mfg. Co.*, 138 F. (2d) 48, 51 (C. C. A. 8).

The order is directly appealable for another reason. In effect, it denies to plaintiffs the protection they sought in their application in the District Court for an injunction against the enforcement of an unconstitutional State statute which, while it remains on the statute books, threatens them with imminent and irreparable injury. For, as already stated, the order may effectively terminate their suit for such an injunction. Moreover, the order does not give plaintiffs the immediate relief which they prayed for and need to protect their constitutional rights and liberties from invasion by the challenged statute. In its most favorable light, the order unduly and unnecessarily postpones indefinitely a decision on their application for relief, pending the determination by the State courts of questions which the District Court itself was under a duty to decide.

An order which thus denies to plaintiff the protection of the injunction prayed for is an order denying an injunction within the meaning of section 266 of the Judicial Code, and is appealable thereunder. Cf. *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U. S. 430; *Hickey* v. *Johnson*, 9 F. (2d) 498 (C. C. A. 8); *Banco Mercantile Americano De Cuba* v. *Taggart Coal Co.*, 276 Fed. 388 (C. C. A. 5). See *King Mechanism & E. Co.* v. *Western Wheeled Scraper Co.*, 59 F. (2d) 546 (C. C. A. 7).

Nor is the stay order less injunctive in nature or less appealable merely because it provides that it may be vacated upon the happening of certain contingencies. See *Glenn* v. *Field Packing Co.*, 290 U. S. 177; *Wald Transfer and Storage Co.* v. *Smith*, 290 U. S. 602; *Lee* v. *Bickell*, 292 U. S.

415. See *Shanferoke C. & S. Corp.* v. *Westchester S. Corp.*, 293 U. S. 449.

2. *The Foregoing Construction of the Appeal Provisions of Section 266 of the Judicial Code, is Consistent With and Furthers the Intent of Congress in Enacting Section 266 and the Stay Provisions Thereof.*

Nothing in the legislative history of section 266 or the amendments thereto indicates a Congressional purpose to exclude direct appeals to the Supreme Court from stay orders issued by a three-judge court. Nor is there any intention to exclude review of interlocutory orders, such as was the case in the statutes involved in *United States* v. *California Canneries*, 279 U. S. 553 and *United States* v. *Rice*, 327 U. S. 742.

On the contrary, Section 266 and its amendments were designed to provide for the expeditious determination and appellate review of suits instituted thereunder. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 14; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320-321. It is for this reason that that section vests direct and complete appellate review in the Supreme Court of cases properly before a three-judge court (*re Buder*, 271 U. S. 461, 466; *Public Service Commission* v. *Brashear Freight Lines*, 306 U. S. 204, 207; *Smith* v. *Wilson*, 273 U. S. 388) to the exclusion of the Circuit Court of Appeals. See *Stratton* v. *St. Louis Southwestern Ry. Co., supra; Brucker* v. *Fisher*, 49 F. (2d) 759 (C. C. A. 6). Cf. *United States* v. *California Canneries*, 279 U. S. 553.

But a case under Section 266 in which a stay has been erroneously granted by a three-judge court cannot be speedily determined unless the stay order is subject to direct appellate review as of right in the Supreme Court, par-

ticularly since as stated, such an order is not appealable to the Circuit Court of Appeals.

Congress must have been aware of this when it enacted the stay provisions of the 1913 Amendment. It must also have been aware of the existing provisions of section 266 for expeditious appeals. The fact that it did not specifically provide for direct Supreme Court appellate review of a stay order must be attributable, therefore, not to a design to interdict such appeals but rather to a belief that the existing provisions for appellate review were adequate to permit such appeals.

A contrary construction of section 266, would invite unreasonable delays in the determination of proceedings thereunder, particularly where, as in the instant case, it is clear under State law that the State court upon the basis of whose proceedings the stay order issued, had acted without jurisdiction. See N. 18, supra. Instead of avoiding delay, such a stay order would create it.

To permit the proceedings to be stayed erroneously, without immediate appellate review of the stay order, while the State courts determine a jurisdictional question to which there can only be one answer, will seriously retard the determination of the instant case on its merits, will seriously impair plaintiffs' constitutional rights and liberties, and will cause plaintiffs irreparable injury. Such a result would plainly defeat the ends of justice, and delay its administration. A construction of section 266 which would lead to a result so at war with its purpose should not be adopted. See *Markham* v. *Cabell*, 326 U. S. 404, 409; *United States* v. *Rice*, 327 U. S. 742, 752-753; Cf. *United Public Workers* v. *Mitchell*, 330 U. S. 75.

VII. Plaintiffs append hereto [26] a copy of (1) the opinion of the three-judge District Court delivered in this cause upon which the stay order issued herein is based (Appendix B), (2) the opinion by District Judge Fake upon which the temporary restraining order was based (Appendix C), and (3) the preliminary injunction [27] of the State Court of Chancery referred to in this Statement (Appendix D).

Conclusion

It is respectfully submitted that, for the foregoing reasons, the Supreme Court has jurisdiction of this appeal under Sections 266 and 238 of the Judicial Code as amended.

Respectfully submitted,

ISRAEL B. GREENE,
Attorneys for Plaintiffs,
1180 Raymond Blvd.,
Newark, N. J.

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[26] Clerk's Note—Appendices "B," "C" and "D" are printed as appendices to the Motion for leave to file file petition for writ of mandamus or certiorari in No. 172, Misc., and are not represented here.

[27] The Court of Chancery did not file any opinion.

APPENDIX "A"

Chapter 47, P. L. 1947. Approved Apr. 9, 1947

SENATE, No. 323

STATE OF NEW JERSEY

Introduced April 8, 1947. By Mr. Summerill

(Without Reference)

A True Copy—

AN ACT to amend the title of "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State," approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), so that the same shall read "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; providing for compulsory arbitration of labor disputes in public utilities; and providing penalties for the violation thereof"; and to supplement the body of said act.

Be it enacted *by the Senate and General Assembly of the State of New Jersey:*

1. The title of "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State," approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), is amended to read "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; providing for compulsory

arbitration of labor disputes in public utilities; and providing penalties for the violation thereof."

2. It shall be unlawful for any employee or representative of any craft, class or group of employees of a public utility to institute, participate in or aid in the conduct of a strike or work stoppage or for a public utility or any officer, agent or representative thereof to institute, participate in or aid in any lockout until sixty days shall have elapsed after written notice of intention to institute, participate or aid in the conduct of a strike or work stoppage or lockout has been served by the employee or representative intending to institute, participate in or aid in a strike or work stoppage or the public utility intending to institute, participate in or aid in a lockout upon the State Board of Mediation and the other party to the dispute. Said notice may be served on or after but not before the termination of the collective bargaining agreement between the parties and in cases where no such collective bargaining agreement exists, may be served at or after but not before the expiration of the notice of desired changes required to be served under the provisions of the act which this act supplements. During the aforementioned sixty-day period it shall be the duty of all parties to continue their endeavors in good faith to reach an agreement and said sixty-day period may be extended by written agreement of the parties, filed with the State Board of Mediation.

3. After the Governor has taken or shall take possession of any plant, equipment or facility of any public utility, pursuant to the provisions of section thirteen of the act which this act supplements, it shall be unlawful for any person employed, or who has been employed immediately prior to such taking of possession by the Governor, at such plant or facility to participate in or aid in any strike, work stoppage or concerted refusal to work for the State as a means of enforcing demands of employees against the State or for any other purpose.

4. Within ten days after the Governor has taken or shall take possession of any plant, equipment or facility of any public utility pursuant to the provisions of section thirteen

of the act which this act supplements, or within ten days after the effective date of this act, whichever is later, any and all disputes then existing between the public utility and its employees shall be submitted to a Board of Arbitration to be constituted within such ten-day period as follows: the management of such public utility and the representatives of such employees shall each designate in writing one person to serve as a member of such Board of Arbitration and file such designation with the State Board of Mediation; the two persons so designated shall choose three disinterested and impartial persons and shall file such designations with the State Board of Mediation, and the five thus appointed shall compose, and act as the Board of Arbitration. In the event that the persons designated by the management and the representatives of the employees shall, within such ten-day period, fail to choose the three disinterested and impartial persons hereinabove referred to, and file the designations of such persons with the State Board of Mediation, then the Governor shall, upon being notified to that effect by the State Board of Mediation, forthwith appoint such three disinterested and impartial persons to serve as members of such Board of Arbitration.

In the event that either the management of the public utility involved or the representatives of the craft, class or group of employees shall fail or neglect to designate, as hereinabove provided, persons to represent them respectively upon such Board of Arbitration, within such ten-day period, then the Governor shall, upon being notified thereof by the State Board of Mediation, forthwith appoint five disinterested and impartial persons to constitute such Board of Arbitration. All appointments hereinabove required to be made shall be filed with the State Board of Mediation.

5. The Board of Arbitration shall promptly proceed to arbitrate the matters submitted to it. It shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties involved in the labor dispute of such information as may be necessary to a determination of the issue

or issues in dispute. Both parties to the dispute shall be afforded an opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the Board of Arbitration shall deem relevant to the issue or issues in controversy.

6. It shall be the duty of the Board of Arbitration to make written findings of fact and to promulgate a written decision and order upon the issue or issues presented in each case. Such findings, decision and order shall be made within thirty days after submission of the matters in dispute or within such additional period as may be agreed upon by a majority of the members of such board. The findings, decision and order of such board shall forthwith be filed by such board with the Governor, and a copy of such findings, decision and order shall be submitted to each of the parties to the dispute and another copy thereof filed with the State Board of Mediation.

7. The findings, decision and order of the Board of Arbitration shall be conclusive and binding upon all of the parties to the dispute. The decision and order of such board shall be complied with by the parties in accordance with the terms thereof. The Board of Arbitration may, in its discretion, with respect to any labor dispute existing at the effective date of this act, provide that any award made by it shall be retroactive to the day of the return to work by the employees or, with respect to any labor dispute occurring after the effective date of this act, to the day of the taking of possession pursuant to the provisions of section thirteen of the act which this act supplements, or to the day of the return to work by the employees, or to the day of the termination of any contract between a public utility and its employees.

8. Any lockout, authorized or engaged in, by any public utility, or any strike or work stoppage, authorized or engaged in, or continued to be engaged in by any labor union or representative of any craft, class or group of employees of a public utility, or any concerted or simultaneous action on the part of a substantial number of the members of any labor union resulting in an interruption of the operation

of any public utility, in violation of any provision of this act or in violation of the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, shall subject such public utility and any officer or agent thereof participating or aiding therein or such labor union or representative of any craft, class or group of employees of a public utility to a penalty in the sum of ten thousand dollars ($10,000.00) per day for each day during the period of such lockout, strike or work stoppage, such penalty to be recovered in the name of the State in an action at law in any court of competent jurisdiction.

9. Any person who shall willfully violate, or aid and abet the violation of any of the provisions of this act, or attempt to do so, shall, for each such offense, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than two hundred fifty dollars ($250.00) nor more than five hundred dollars ($500.00) or be imprisoned for a period not exceeding thirty days, or both. Each day's continuance of the violation shall constitute a separate offense.

10. This act shall take effect immediately.

Chapter 75, P. L. 1947, Approved April 22, 1947

SENATE, No. 333

STATE OF NEW JERSEY

Introduced April 21, 1947. By Mr. Summerill

(Without Reference)

AN ACT relating to labor disputes in certain public utilities; amending the title of "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; providing for compulsory arbitration of labor disputes in public utilities; and providing penalties for

the violation thereof," approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), as said title was amended by chapter forty-seven of the laws of one thousand nine hundred and forty-seven, so that the same shall read "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; prohibiting certain acts for the duration of such seizure and operation; providing for compulsory arbitration of labor disputes in public utilities; providing penalties and injunctive relief for the violation thereof; and providing for declaratory and other relief with respect thereto," and amending and supplementing the body of said act; and amending the title of "An act to amend the title of 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State,' approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), so that the same shall read 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; providing for compulsory arbitration of labor disputes in public utilities; and providing penalties for the violation thereof'; and to supplement the body of said act," approved April ninth, one thousand nine hundred and forty-seven (P. L. 1947, c. 47), so that the same shall read "An act to amend the title of 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State,' approved March twenty-six, one thousand nine hundred and forty-six (P. L. 1946, c. 38), so that the same shall read 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public

utilities by the State; prohibiting certain acts for the duration of such seizure and operation; providing for compulsory arbitration of labor disputes in public utilities; providing penalties and injunctive relief for the violation thereof; and providing for declaratory and other relief with respect thereto,' and to supplement the body of said act," and amending the body of said act.

Be it enacted *by the Senate and General Assembly of the State of New Jersey:*

1. The title of "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; providing for compulsory arbitration of labor disputes in public utilities; and providing penalties for the violation thereof," approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), as said title was amended by chapter forty-seven of the laws of one thousand nine hundred and forty-seven, is amended to read "An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; prohibiting certain acts for the duration of such seizure and operation; providing for compulsory arbitration of labor disputes in public utilities; providing penalties and injunctive relief for the violation thereof; and providing for declaratory and other relief with respect thereof."

2. The title of "An act to amend the title of 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State,' approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), so that the same shall read 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; providing for compulsory

arbitration of labor disputes in public utilities; and providing penalties for the violation thereof"; and to supplement the body of said act," approved April ninth, one thousand nine hundred and forty-seven (P. L. 1947, c. 47), is amended to read "An act to amend the title of 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; and providing for seizure and operation of public utilities by the State,' approved March twenty-sixth, one thousand nine hundred and forty-six (P. L. 1946, c. 38), so that the same shall read 'An act concerning labor disputes in public utilities; providing for collective bargaining; enlarging the duties of the State Board of Mediation; providing for seizure and operation of public utilities by the State; prohibiting certain acts for the duration of such seizure and operation; providing for compulsory arbitration of labor disputes in public utilities; providing penalties and injunctive relief for the violation thereof; and providing for declaratory and other relief with respect thereto,' and to supplement the body of said act."

3. Section one of chapter thirty-eight of the laws of one thousand nine hundred and forty-six is amended to read as follows:

1. It is hereby declared to be the policy of the State that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people; that the possibility of labor strife in utilities operating under governmental franchise is a threat to the welfare and health of the people; that utilities operating under such franchise are clothed with public interest, and the State's regulation of the labor relations affecting such public utilities is necessary in the public interest.

It is further declared to be the policy of this State that after the taking of possession of any public utility by the State pursuant to the provisions of section thirteen hereof, such public utility shall become for purposes of production and operation a State facility and the use and operation thereof by the State in the public interest shall be considered a governmental function of the State of New Jersey.

4. Section three of chapter forty-seven of the laws of one thousand nine hundred and forty-seven is amended to read as follows:

3. After the Governor has taken or shall take possession of any plant, equipment or facility of any public utility for the use and operation by the State of New Jersey in the public interest, pursuant to the provisions of section thirteen of the act which this act supplements, and during the continuance of such possession, the relationship between the Government of the State of New Jersey and the persons employed at such public utility, except those who elect to quit such employment, shall be that of employer and employee; and during the continuance of such possession it shall be unlawful for any person employed at such plant or facility to participate in or aid in any strike, concerted work stoppage or concerted refusal to work for the State as a means of enforcing demands of employees against the State or for any other purpose contrary to the provisions of this act.

5. Section four of chapter forty-seven of the laws of one thousand nine hundred and forty-seven is amended to read as follows:

4. Within ten days after the Governor has taken or shall take possession of any plant, equipment or facility of any public utility pursuant to the provisions of section thirteen of the act which this act supplements, or within ten days after the effective date of this act, whichever is later, any and all disputes then existing between the public utility and the employees shall be submitted to a Board of Arbitration to be constituted within such ten-day period as follows: the management of such public utility and the representatives of such employees shall each designate in writing one person to serve as a member of such Board of Arbitration and file such designation with the State Board of Mediation; the two persons so designated shall choose three disinterested and impartial persons and shall file such designations with the State Board of Mediation, and the five thus appointed shall compose, and act as the Board of Arbitration. Such board shall elect one of its

members to serve as chairman thereof. In the event that the persons designated by the management and the representatives of the employees shall, within such ten-day period, fail to choose the three disinterested and impartial persons hereinabove referred to, and file the designations of such persons with the State Board of Mediation, then the Governor shall, upon being notified to that effect by the State Board of Mediation, forthwith appoint such three disinterested and impartial persons to serve as members of such Board of Arbitration and shall designate one of the members of such board to serve as chairman thereof.

In the event that either the management of the public utility involved or the representatives of the craft, class or group of employees shall fail or neglect to designate, as hereinabove provided, persons to represent them respectively upon such Board of Arbitration, within such ten-day period, then the Governor shall, upon being notified thereof by the State Board of Mediation, forthwith appoint five disinterested and impartial persons to constitute such Board of Arbitration and shall designate one of the members of such board to serve as chairman thereof. All appointments hereinabove required to be made shall be filed with the State Board of Mediation.

6. Section five of chapter forty-seven of the laws of one thousand nine hundred and forty-seven is amended to read as follows:

5. The Board of Arbitration shall promptly proceed to arbitrate the matters submitted to it. It shall promptly hold hearings and shall have the power to administer oaths and compel by subpoena the attendance of witnesses and the furnishing and production by any person of such information, books, records, papers and documents as may be necessary to a determination of the issue or issues in dispute. If a person subpoenaed to attend any hearing refuses or fails to appear or to be examined, or to answer any question or to produce any books, records, papers and documents when ordered so to do by the Board of Arbitration, such board may apply to the Supreme Court or any justice thereof, who shall have the power of the court for

that purpose, to make an order returnable in not less than two nor more than five days, directing such person to show cause before the court or a justice thereof why he should not comply with the subpoena or direction or order of such board, and upon return of such order the court or justice shall examine such person, under oath, and thereupon make such order as may be required and any refusal or failure to obey such order of the court or the justice may be punished by said court or by said justice as a contempt of the Supreme Court. Both parties to the dispute shall be afforded an opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the Board of Arbitration shall deem relevant to the issue or issues in controversy.

7. Section seven of chapter forty-seven of the laws of one thousand nine hundred and forty-seven is amended to read as follows:

7. The findings, decision and order of the Board of Arbitration shall, unless modified or reversed on appeal, be conclusive and binding upon all of the parties to the dispute and such order of such board shall be complied with by the parties in accordance with the terms thereof. The order of the Board of Arbitration shall remain in effect for a period of one year from the date thereof unless the board shall fix a lesser period therefor after having given due consideration to the duration of any prior contract between the public utility and the employees thereof and any practice with respect to the duration of such contract existing in the same or similar industries.

The Board of Arbitration may, in its discretion, with respect to any labor dispute existing at the effective date of this act, provide that any award made by it shall be retroactive to the day of the return to work by the employees or, with respect to any labor dispute occurring after the effective date of this act, to the day of the taking of possession pursuant to the provisions of section thirteen of the act which this act supplements or to the day of the return to work by the employees, or to the day of the termination

of any contract between the public utility and its employees.

Within thirty days after the Board of Arbitration has filed with the Governor such findings, decision and order, any party to the dispute aggrieved thereby may secure judicial review thereof by appeal therefrom to the Supreme Court. A copy of the notice of appeal shall be served upon the chairman of the Board of Arbitration and upon the other party to the dispute or its attorney. In any such appeal the findings of the Board of Arbitration upon the facts, if supported by any evidence, shall be conclusive. The filing of such notice of appeal shall not supersede or stay the order of the Board of Arbitration unless the Supreme Court or a justice thereof shall so direct.

8. Section eight of chapter forty-seven of the laws of one thousand nine hundred and forty-seven is amended to read as follows:

8. Any lockout, authorized or engaged in, by any public utility in violation of any provision of this act, or any failure or refusal by a public utility to abide by the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, or any strike or concerted work stoppage, authorized or engaged in, or continued to be engaged in by any labor union or representative of any craft, class or group of employees of a public utility, or any concerted action on the part of a substantial number of the members of any labor union resulting in an interruption of the operation of any public utility, in violation of any provision of this act or in connection with any refusal to abide by the terms of any decision or order made by any Board of Arbitration constituted in accordance with the provisions of this act, shall subject such public utility and any officer or agent thereof participating or aiding therein or such labor union or representative of any craft, class or group of employees of a public utility to a penalty in the sum of ten thousand dollars ($10,000.00) per day for each day during the period of such lockout, strike or concerted work stoppage, such penalty

to be recovered in the name of the State in an action at law in any court of competent jurisdiction.

9. Section fifteen of chapter thirty-eight of the laws of one thousand nine hundred and forty-six is amended to read as follows:

15. Under no circumstances shall any employee be required to render, perform or engage in any work, labor or service without his consent; nor shall anything in this act, or in any amendment thereof or supplement thereto, be construed to make the quitting of his work, labor or services by an individual employee an illegal or prohibited act; nor shall any court issue any process to compel the performance by an individual employee of such work, labor or service without his consent.

10. Section seventeen of chapter thirty-eight of the laws of one thousand nine hundred and forty-six is amended to read as follows:

17. If any clause, sentence, paragraph or part of this act, or of any supplement thereto or amendment thereof, or the application thereof to any person or circumstances, shall for any reason be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, or such supplement thereto or amendment thereof, and the application of such provision to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this act and such supplement thereto and amendment thereof would have been adopted had such invalid provision not been included therein.

11. Notwithstanding the provisions of any other law to the contrary:

The commissioner, director or other chief administrative officer of any department or agency of the Government of the State of New Jersey through which the power and authority of the Governor in the use and operation of the

plant, equipment or facility of any public utility is exercised pursuant to the provisions of section thirteen of chapter thirty-eight of the laws of one thousand nine hundred and forty-six, or the Attorney-General, may file a bill in the Court of Chancery in the name of this State, on the relation of said commissioner, director or other chief administrative officer, or Attorney-General, as the case may be, for an injunction to prohibit any violation of any of the provisions of this act, or of any provision of any act which this act supplements or amends, or for any declaratory and other relief. Every such cause shall proceed in the Court of Chancery according to the rules and practice of bills filed in the name of the State of New Jersey or the Attorney-General on the relation of individuals or departments, or for the protection of property owned or operated by the State of New Jersey; and causes of emergency shall have precedence over other litigation pending at the time in the Court of Chancery, and the final hearing may be had at such time and on such notice as the Chancellor shall direct; and the Court of Chancery shall have power and authority to grant such relief and make or render such orders and decrees as it shall determine to be equitable and just in the premises.

12. Section nine of chapter forty-seven of the laws of one thousand nine hundred and forty-seven is amended to read as follows:

9. Any officer or agent of any public utility or labor union, or any person performing the duties of such officer or agent, who shall willfully violate, or aid and abet the violation of any of the provisions of this act, or attempt to do so, shall, for each such offense, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five dollars ($25.00) nor more than two hundred fifty dollars ($250.00). Each day's continuance of the violation shall constitute a separate offense.

13. This act shall take effect immediately.

No. 438. TRAFFIC TELEPHONE WORKERS' FEDERATION ET AL. *v.* DRISCOLL, GOVERNOR, ET AL. Appeal from the District Court of the United States for the District of New Jersey. *Per Curiam:* The appeal is dismissed for want of jurisdiction. Judicial Code, § 266. Dissenting: MR. JUSTICE BLACK and MR. JUSTICE REED. *Israel B. Greene* for appellants. Reported below: 72 F. Supp. 499.